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CROSS-BORDER LITIGATION INVOLVING CANADIAN AND U.S. LITIGANTS

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I. INTRODUCTION

Selected Areas for Examination

Senator Sam Ervin, of Watergate fame, used to tell the story of the young lawyer who attended a revival meeting and was asked to deliver a prayer. Unprepared, he gave a prayer straight from his lawyer's heart, "Stir up much strife amongst the people, Lord, lest thy servant perish."

Much strife can arise in the Canada United States cross-border context, whether between:

- a) the two states;
- b) the individuals or corporations in those states;
- c) the individuals or corporations in one state and the other foreign state or one of its emanations; or
- d) the individuals or corporations in those states and a third state, one of its emanations or an international organization.

I have been asked to speak about some of the nuts and bolts of cross-border litigation. Certain aspects were covered in depth by Mr. Ristau. I will try to complement what he said. His experience is very broad while mine has been selective. Therefore, I leave the main lines to him and I shall try and highlight a few specific points. I only intend to give a broad-brush treatment of a few of the matters that arise in trans-border litigation.

Litigation Between the Governments of Canada and the United States

Litigation between Canada and the United States has not been extensive. Over the last sixty years we have had the *I'm Alone*, the *Trail Smelter*, and the *Gut Dam* arbitrations, and the *Georges Bank* case in the International Court. These proceedings are in the esoteric domain of public international law and, hence, are of a rare and wholly unique kind in which it is unlikely most lawyers will ever be involved.

Closer to home are proceedings under the Canada-United States Free Trade Agreement which could have more impact. The FTA represents a discrete but growing subject of specialized cross-border litigation involving governments as well as private parties. Close attention should

* Stikeman Elliott, Ottawa, Canada. The author wishes to express his appreciation to Torsten Strom for his assistance in preparing this article.

be paid to this source of litigation as it evolves. It is not inconceivable that there will be greater recourse to litigation in state-to-state disputes in the future, (particularly in relation to general treaty interpretation).

Recourse to litigation in state-to-state disputes as an option to negotiation has been encouraged by both the American and Canadian Bar Associations. The two Bar Associations endorsed the concept of a regular and defined means of ultimately litigating disputes involving the interpretation of treaties. It continues to be a concern that there is no cross-border equivalent between Canada and the United States regarding treaty disputes (other than under The Free Trade Agreement). The sanction of litigation, which usually exists in relations between ordinary legal persons, is lacking.

II. CROSS-BORDER LITIGATION FROM A CANADIAN PERSPECTIVE

The International Framework

In considering cross-border litigation, an arbitrary division can be made between the framework, or skeletal matters, which essentially constitute form, and those matters which build upon the framework. Cross-border litigation is a very broad field, and this article will touch upon only a few of the interesting issues in the latter group; that is, certain matters of a more substantive nature.

Many issues may arise in relation to trans-border litigation, including service out of the jurisdiction, the application of foreign law, and the rules of comity. Two important framework issues involve international arrangements for the service of documents and the obtaining of evidence abroad under the two relevant Hague Conventions. Mr. Ristau elaborated on these framework issues.

Another framework matter is the recognition of foreign judgments. In Canada there is provincial legislation dealing with the reciprocal enforcement of judgments, and there is also parallel legislation dealing with the reciprocal enforcement of maintenance orders. These laws extend to some jurisdictions in the United States.¹

There is much jurisprudence on the subject of recognition and enforcement of foreign judgments. Without attempting to encapsulate the many rules of the conflict of laws, subject to exceptions such as tax or penal orders, the general rule is that a foreign judgment on a particular issue will be regarded as conclusive.²

Canadian Constitutional Constraints

In Canada the federal executive is responsible for the making of treaties. The implementation of international agreements, however, fol-

¹ See e.g., The Reciprocal Enforcement of Maintenance Orders Act, ONT. STAT. ch. 9 (1982); The Reciprocal Enforcement of Judgments Act, ONT. REV. STAT. ch. 432 (1980).

² Jean-Gabriel Castel, CANADIAN CONFLICT OF LAWS 15 (2d ed. 1986).

lows the division of powers between Parliament and the provincial legislatures. In other words, if all or part of a treaty requires legislation to give it effect, it must be implemented by Parliament or the legislatures, or both, as the case may be, in accordance with the division of legislative powers in the Constitution.

The constitutional rationale for this position is that if the Parliament of Canada could implement any international agreement it entered into, the door would be open to a significant accretion of federal power not contemplated by the division of legislative authority in the Constitution Act of 1867. This was established by the Labour Conventions Case, *Attorney Gen. of Canada v. Attorney Gen. of Ontario*,³

What this means for cross-border litigations is exemplified in two concrete and pertinent examples.

The first example involves the Hague Service Convention. The Government of Canada acceded to it upon satisfying itself that provincial law and rules of court were consistent, or would be brought into line, with the obligations that Canada would undertake under the Convention. With the exception of the Federal Court, the relevant legislation and rules are all within the provincial field of competence as matters of property and civil rights in the province. The accession was recent because of the time required to ensure consistency of all laws and rules of court with the Convention.

The second example involves the Hague Evidence Convention. This Convention also has deals with matters essentially within provincial competence, again relating to property and civil rights. Although the Canada Evidence Act may serve as a vehicle for its introduction into domestic law to some limited degree, particularly in relation to criminal matters which are exclusively federal, efforts have been made for some time to procure the modification of all provincial laws to bring them into conformity with the Convention. Until this is accomplished, Canada cannot accede to this Convention. Partial implementation is not possible in the absence of the modern form of the federal state clause now used in most international private law conventions. There are, however, ways around this impediment to the application of international norms. For example, in relation to trans-boundary pollution, the ABA/CBA Joint Working Group on Dispute Settlement proposed that a regime of equal access be established permitting a person in one jurisdiction who has suffered pollution damage to sue in the jurisdiction where the pollution originated on the same basis as if that person were injured and were a resident in the latter jurisdiction. By this approach, one is able to circumvent the rule applied in many jurisdictions, which recognizes status to sue only where the damage is suffered, not where it originates.

This approach involves property and civil rights in the province, a matter of exclusive provincial jurisdiction and requires a consequent

³ [1937] A.C. 326 (P.C.).

change in provincial law. Uniform legislation on this subject was procured and enacted in several jurisdictions in Canada; for example: the Ontario Transboundary Pollution Reciprocal Access Act, 1986, ONT. REV. STAT. ch. 20 (1986). A number of other provinces and states have passed the same uniform law. This example also illustrates that in Canada, for certain issues, one can effect the extension of certain international rules by reciprocal legislation, without the constraint of having all jurisdictions enact legislation.

A similar piecemeal approach has been adopted through the use of a new federal state clause in recent private law conventions, particularly those of the Hague Conference and UNCITRAL. This clause, also useful in the United States, permits federal states to accede to a convention with respect to one or more of its component jurisdictions and to extend the application of the convention to other component jurisdictions as their laws are brought into conformity with the obligations that flow from it.

Extraterritorial Application of Law

Although not within the scope of this topic, it is important to note the influence of what is to some the extraterritorial application of foreign law and to others the exercise of domestic long arm jurisdiction. As will be evident, the description will vary according to whether one is using, or sought to be made subject to, the particular domestic jurisdiction.

While most issues of long arm jurisdiction will be brought before the courts of the state whose jurisdiction is invoked, there may be circumstances where Canadian courts are seized of peripheral issues. One such example is the *Gulf* case which will be discussed later. Other peripheral issues could arise out of attempts to control the commerce of Canadian subsidiaries of United States enterprises in relation to prohibited exports.

The provisions of the Foreign Extraterritorial Measures Act, R.S.C. ch. F-29 (1985), may be relevant where export control legislation is sought to be applied. The most recent example relates to the successor to the 1990 "Mack Amendment," a proposal before Congress which, if enacted, would have the effect of making it illegal for a U.S. subsidiary located outside the United States to trade with Cuba. The Canadian Government has already indicated it would block Canadian firms from complying with such a measure.

The Foreign Extraterritorial Measures Act may also apply in proceedings where long arm jurisdiction is asserted and where judicial assistance may be sought in relation to domestic proceedings. The Act will provide an underpinning for Canadian courts to refuse judicial assistance in cases where national sovereignty is seen to be threatened.

III. EVIDENTIARY ISSUES IN CROSS BORDER LITIGATION

Taking of Evidence in Canada

The basic position in Canada is that there are no prohibitive rules regarding the taking of evidence in civil or criminal proceedings. Where, however, compulsion of the witness is necessary, the intervention of a Canadian court is required. This intervention is provided either in accordance with a treaty or statute. As Canada is not yet a party to the Hague Evidence Convention and, as there is no Canada-United States or Empire (i.e. pre-1931) treaty which applies, one is sent directly to the statutes.⁴

When dealing with a situation involving the taking of evidence in Canada for foreign proceedings, the first place one should refer to in the statutes is Part II of the Canada Evidence Act. The Act states that in the absence of Rules of Court dealing with the evidence to be produced in support of an application, the basic means of obtaining the evidence are letters of request or letters rogatory,⁵ a traditional procedure which, of course, is specifically provided for in the Hague Evidence Convention.

In addition to the Canada Evidence Act, there will probably be applicable and parallel provincial legislation on the subject, such as that found in the Ontario Evidence Act. As there is generally no basic contradiction between them, both are frequently relied on, although the Canada Evidence Act alone is resorted to for criminal matters. In addition, where a commissioner has not been identified in the foreign request, the Canada Evidence Act, which does not require such an appointment by the party making the request, may be used as authority for the hearing by a commissioner appointed by the Canadian court.⁶

Both the Canada Evidence Act and the companion provincial evidence acts give discretion to the Court to grant letters rogatory where:

- a) there is a civil, commercial or criminal matter pending before a foreign court or tribunal; and
- b) it appears that the judge of the foreign court or tribunal is desirous of obtaining the testimony of the witness in Canada.

The Canada Evidence Act contemplates a request to a Canadian court from a foreign court to order the examination of a witness. The subsequent order of the Canadian court may be enforced in the usual way. This is the classic letters rogatory situation requiring the intervention of the courts of the receiving state. The Ontario Evidence Act also contemplates a court intervention, and applies where a mere commission to take evidence has been issued by the foreign court.⁷ Under the

⁴ JEAN-GABRIEL CASTEL, *supra* note 2 at 122.

⁵ § 51(2) Evidence Act.

⁶ *Re Paramount Film Distributing Corporation v. Ram*, [1954] O.W.N. 753.

⁷ *Pan American World Airways v. Tas International Travel*, 37 O.R.2d 59 (1982).

method followed in the Hague Evidence Convention, letters rogatory may also be directed to other competent judicial authorities.

The discretion under the evidence acts is generally exercised after considering such things as whether the evidence is for trial or discovery, whether it is necessary for the trial, and whether it is contrary to public policy.⁸

The attitude of Canadian Courts to a request by letters rogatory is that they should be given effect. In *National Telefilm Association v. United Artists*,⁹ Thompson, J. said:

In any event, in the absence of evidence to the contrary, I think it must be assumed that the order of a foreign jurisdiction is regular and in conformity with the Rules and Practice of that jurisdiction. To treat it otherwise would be to undermine the comity which exists between nations with respect to the obligations of the laws of one within the territories of another. It is this comity which I think the pertinent statutes envisage and not simply the comity of Courts. I therefore apprehend that the American order should, wherever possible, be accorded full force and effect.¹⁰

The traditional prevailing attitude regarding the acceptability of the purpose for which evidence is sought is reflected in the same judgment as follows:

From these cases it appears clear that neither in England nor in this Province, where the governing statutes are similar, will the Court, in aid of foreign proceedings, order or require a witness whether a party or not, to submit to examination or production for the purposes of discovery or pre-trial, but will order such examination and production only for the purposes of affording testimony, oral or documentary in the nature of proof for the use at trial.¹¹

In *Re Westinghouse Elec. Corp. and Duquesne Light Co.*,¹² Robins, J. said:

The enforcement of letters rogatory is always a matter within the discretionary power of the Court. Their enforcement is based upon international comity or courtesy proceeding from the law of nations. Inherent in the idea of international comity is a mutuality of purpose and of power. As a matter of principle Courts of justice of different countries are in aid of justice under a mutual obligation consistent with their own jurisdiction to assist each other in obtaining testimony upon which the rights of a cause may depend; so generally are individuals under a duty to give their testimony to Courts of justice in all inquiries

⁸ See *Evans v. Kraay*, 35 C.P.C.2d 86 (Sask. 1989); *Seminole Electric Co'op v. BBC Brown Boveri*, 35 D.L.R.4th 102 (N.B. 1987); *A-Dec Inc. v. Dentech Products*, 32 C.P.C.2d 290 (B.C. 1988).

⁹ 14 D.L.R.2d 343 (Ont. High Court 1958).

¹⁰ *Id.* at 346.

¹¹ *Id.*

¹² 16 O.R.2d 273 (Ont. High Court 1977).

where it may be material. Courts in Canada recognize, and have often said, that, in the interests of comity, judicial assistance should whenever possible be given at the request of Courts of other countries [citations omitted]. It is also fundamental that comity will not be exercised in violation of the public policy of the state to which the appeal is made or at the expense of injustice to its citizens; and comity leaves to the Court whose power is invoked the determination of the legality, propriety or rightfulness of its exercise [citations omitted].¹³

A more liberal approach has, however, been taken on occasion. This is illustrated by the view of the Supreme Court of Canada regarding a letter of request directed only to documents. In *United States Dist. Court v. Royal Am. Shows*,¹⁴ it held that an order for testimony by way of documentary evidence could be made independently of an order for *viva voce* testimony. The Court, however, is not prepared to follow a broader approach where the sovereignty of Canada may be involved.¹⁵

Finally, apart from some of the technical requirements such as that the requesting body must be a court and not an administrative tribunal or an embassy, that the request does not constitute a "fishing expedition" and that it does not violate local laws of civil procedure, it is clear that the two important general limitations are that:

- (1) no witness is required to undergo a broader form of enquiry than he would if the litigation were being conducted locally; and
- (2) the evidence could not be secured except by intervention of the courts.¹⁶

If Canada were to accede to the Hague Evidence Convention, it is unlikely the practical considerations would change substantially since the object of the Convention is to make available to foreign litigants the same powers of compulsion as exist for Canadian litigants respecting evidence sought in Canada. Some reservation permitted by the Convention with respect to pre-trial discovery might bring the application of the Convention into line with the current practice of Canadian courts.

Letters Rogatory and Discovery

The general approach of the courts using letters rogatory in relation to discovery is that taken by the Ontario Court of Appeals in *Re Raychem Corp. v. Canusa Coating Systems, Inc.*,¹⁷ where Mr. Justice Brooke, giving the reasons of the Court, stated:

It is the law of this Province that whether one proceeds under the relevant provisions of the *Ontario Evidence Act*, R.S.O. 1960, 125, or the *Canada Evidence Act*, R.S.C. 1952, c. 307, the Court will order an

¹³ *Id.* at 290-1.

¹⁴ 1 S.C.R. 414 (1982).

¹⁵ *Gulf Oil Corp. v. Gulf Canada Ltd.*, 2 S.C.R. 39 (1980).

¹⁶ Jean-Gabriel CASTEL, *supra*, note 2 at 130.

¹⁷ 14 D.L.R.3d 684 (1970).

examination of a witness only if it is clear that what is intended is the taking of that evidence for the purpose of trial. No such order will be made if the principal purpose is to use such proceedings to search out evidence and information in the same way as an examination for discovery.¹⁸

The judicial attitude toward letters rogatory in relation to discovery has, however, undergone a minor shift toward a more flexible approach. While there exists a bias against honoring letters rogatory in pre-trial proceedings, where a strong case can be made as to the importance of the evidence and Canada's sovereignty is not thereby infringed, an order may issue.

The Supreme Court of Canada laid down this rule in *R. v. Zingre*,¹⁹ which involved a criminal procedure where pretrial testimony required under Swiss law had to be taken in Canada. The general approach to be adopted was outlined by Dickson, J.:

As that great jurist, U.S. Chief Justice Marshall, observed in *The Schooner Exchange v. M'Faddon & Others*, at pp. 136-37, the jurisdiction of a nation within its own territory is necessarily exclusive and absolute, susceptible of no limitation not imposed by itself, but common interest impels sovereigns to mutual intercourse and an interchange of good offices with each other.

It is upon this comity of nations that international legal assistance rests. Thus the courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation but out of mutual deference and respect. A foreign request is given full force and effect unless it be contrary to the public policy of the jurisdiction to which the request is directed (see *Gulf Oil Corporation v. Gulf Canada Limited et al.*) or otherwise prejudicial to the sovereignty or the citizens of the latter jurisdiction.²⁰

He then went on to give a broad interpretation to section 43 (now section 46) of the Canada Evidence Act:

In general, our courts will only order an examination for the purpose of gathering evidence to be used at a trial, but that is not to say that an order will never be made at the pre-trial stage. Section 43 does not make a distinction between pre-trial and trial proceedings. It merely speaks of the foreign court or tribunal "desiring" the testimony of an individual "in relation to" a matter pending before it. I do not think it would be wise to lay down an inflexible rule that admits of no exceptions. The granting of an order for examination, being discretionary, will depend on the facts and particular circumstances of the individual case. The Court or judge must balance the possible infringement of Canadian sovereignty with the natural desire to assist the courts of justice of a foreign land. It may well be that, depending on

¹⁸ *Id.* at 689.

¹⁹ 2 S.C.R. 392 (1981).

²⁰ *Id.* at 400-401.

the circumstances, a court would be prepared to order an examination even if the evidence were to be used for pre-trial proceedings.²¹

The *Zingre* case must be read against the background of its particular facts. *Zingre* was charged with fraud and other criminal offenses in Canada relating to the Churchill Forest Industries development in Manitoba. The accused were not subject to extradition; therefore, Canada requested they be prosecuted in Switzerland. Pursuant to this request, the Swiss authorities sought to take evidence in Canada through examining magistrates. In sum, the request was in accordance with Canadian public policy to secure the prosecution of the accused. It is in this light that the broader view of section 43 must be read.

While Canadian courts are more attuned to discovery as an integral part of litigation than are European courts, they are generally not prepared to entertain fishing expeditions or the securing of pre-trial evidence, absent a compelling and evident requirement for securing it. The *Zingre* case did not shift the equation substantially.

A good illustration is the case of *France (Republic) v. DeHavilland Aircraft of Canada Ltd.*,²² where the Ontario High Court refused to honor letters rogatory regarding evidence sought by a French examining magistrate. The purpose of the request was to secure evidence to determine whether a criminal prosecution in France was statutorily barred by the law of France regarding the evidence it sought in Canada. In the Court's view this was a fishing expedition without the exceptional circumstances that applied in *Zingre*.

State Sovereignty

Another element to be borne in mind in relation to the securing of evidence is the state sovereignty aspect referred to in *Zingre*. Canada has followed the European lead in enacting a so-called "blocking statute" where evidence is sought in relation to matters likely to infringe on Canadian sovereignty. This legislation is the Foreign Extraterritorial Measures Act, R.S.C. ch. F-29 (1985). It not only deals with disclosure of records to foreign tribunals but also with the recognition and enforcement of judgments arising out of proceedings likely to infringe on Canadian sovereignty. This has particular application to antitrust proceedings.

The genesis of Canada's blocking legislation is found in *Gulf Oil Corp. v. Gulf Canada Ltd.*²³ *Gulf* was based on section 43 (now section 46) of the Canada Evidence Act. In this case, letters rogatory were sought to be enforced through the Supreme Court of Canada - an unusual but, at that time, not excluded procedure under the Act.

The case concerned a dispute in the United States between Gulf and

²¹ *Id.* at 403.

²² 40 C.P.C.2d 105 (1989).

²³ 2 S.C.R. 39 (1980).

Westinghouse, the latter having agreed to supply uranium fuel to the reactors it had sold to certain utilities, including Gulf. The world price for uranium rose and Westinghouse could not perform. It blamed the price rise on the so-called uranium cartel and, by way of defense to the proceedings brought against it, brought treble damage antitrust proceedings against Gulf on the basis that it was a member of the uranium cartel.

Gulf, in its defense to the antitrust proceedings, sought to procure certain Canadian documents, including government directives which its Canadian subsidiary, Gulf Canada, would have willingly supplied but for the prohibition to such disclosure contained in the Uranium Information Security Regulations. Two U.S. courts involved in similar proceedings issued letters rogatory to compel production of the documents. Gulf thereupon brought an action against Gulf Canada in the Supreme Court. The real defendant on the application was the Government of Canada.

The Canadian position, conveniently put in an amicus brief in the United States proceedings, was as follows.

Canada considered it contrary to her sovereign prerogatives for foreign tribunals to question the propriety or legality of the actions of Canadian uranium producers that were taken outside the United States and were required by Canadian law or taken in implementation of Canadian government policy. Accordingly, when it became clear that documents located in Canada bearing on the international uranium marketing arrangement might be removed to the United States in response to proceedings there, the Canadian government promulgated the Uranium Information Security Regulations, on September 23, 1976. The Canadian government promulgated the Regulations to serve a vital national interest, particularly the preservation of Canada's past and future sovereign authority to secure compliance with its own laws and policies respecting a vital Canadian natural resource in the face of assertions of jurisdiction by non-Canadian tribunals. These Regulations were not procured by members of the uranium industry, and they were not adopted to protect the commercial interests of those companies.²⁴

In refusing the Gulf application, Laskin, C.J.C. said:

I do not see that the Crown, the government, would be entitled to assert public policy against the enforcement of Canadian law in a Canadian court, but would be so entitled against an attempt to enforce foreign law in a Canadian court. Public policy is therefore involved in the application of rules of conflict of laws, as where the enforcement of foreign law in Canadian litigation may be denied because, for example, the foreign law may be a penal law or a tax law and therefore within the categories that are denied enforcement on policy grounds. So too, where letters rogatory are addressed to a Canadian court, Canadian government intervention on grounds of public policy may simply re-

²⁴ *Supra* note 23 at 55; see also *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*, 1 All. E.R. 434 (H. of L. 1978).

fect an objection to extraterritorial enforcement of foreign law in violation of Canadian sovereignty.²⁵

In this passage the return of the thread of the extraterritorial application of law in the fabric of cross-border litigation is evident. The new legislation, enacted after the *Gulf* case, is a manifestation of the concern that exists outside the United States on this subject.

Simply stated, the Foreign Extraterritorial Measures Act, R.S.C. ch. F-29 (1985), is a potent barrier in some cases to cross-border litigation. The Act, however, is but a reflection of the view in many jurisdictions that U.S. litigation, in certain circumstances, particularly at the discovery stage, overreaches in its impact on foreign jurisdictions. This is a concern that is addressed in Article 12 of the Hague Evidence Convention, which authorizes a refusal to execute letters rogatory where the state addressed considers that such a request would prejudice its sovereignty or security. In contemplating cross-border litigation, the effect of blocking provisions in the Competition Act, CAN. STAT. ch. 26, § 54 (1986), may also have to be considered, as well as provincial legislation which could prevent the disclosure of certain information, such as the Business Records Protection Act, ONT. REV. STAT. ch. 56 (1980), and the Business Concerns Records Act, QUE. REV. STAT. ch. D-12 (1977).

IV. CROSS-BORDER LITIGATION AGAINST GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS

Proceedings in Canada and the State Immunity Act

The discussion of the uranium cartel, the litigation surrounding it, and the discovery of government documents in the hands of third parties underlines the large role of the state and its emanations in the international litigation arena. As a final perspective on cross-border litigation, it might be useful to look briefly at the concept of state immunity.

I do not deal with actions against the Crown in Canada by a foreign party. That is not, strictly speaking, across the border; however, what is the position if a party seeks to bring the United States Government into a Canadian court? That party can be a Canadian resident or can be from a third state. Such a situation in Canada is governed by the State Immunity Act, R.S.C. ch. S-18 (1985) which is the Canadian equivalent of the United States Foreign Sovereign Immunity Act.

The formalities prescribed by the State Immunity Act establish a number of ways to serve an originating document where the United States or some other foreign government is sought to be impleaded in a Canadian court. The most straightforward method is probably to deliver it personally, or by registered mail, to the Undersecretary of State for External Affairs, who is charged with transmitting it to the foreign

²⁵ *Id.* at 62.

state.²⁶

Service upon an agency of the United States or other foreign sovereign can be done in one of several ways specified in the Act, but failing agreement by the agency, the most likely manner is in accordance with any applicable rules of court. The Act provides for such matters as default judgments, setting such judgments aside, execution, and the special position of military property and central bank property. In sum, careful attention must be paid to the State Immunity Act when contemplating an action.

This caution is even more relevant in relation to considering the underpinnings of a claim. In order to proceed effectively, one must bring oneself within the exceptions to sovereign immunity in § 4 of the Act. Assuming no waiver of immunity or submission to jurisdiction pursuant to § 4, the main basis for attack will likely be that the proceedings relate to commercial activities of the foreign state per § 5.

This qualification to sovereign immunity reverses the leading case *Congo v. Venne*,²⁷ where the Supreme Court of Canada refused to adopt the concept of restrictive sovereign immunity in cases involving commercial activities. That concept applied in the United States for some time before the *Congo* decision, albeit as a result of Department of State practice (the Tate letter) rather than of legislation. *Congo* arose out of a dispute with respect to architectural services provided to the Congo in connection with its pavillion at Expo '67.

What does this qualification to the application of sovereign immunity under the State Immunity Act mean in practice? Can an ordinary litigant realistically expect to easily pursue a foreign sovereign state in the courts of Canada where, arguably, the cause of action arose out of the commercial activities of that state? One of the most recent examples of such a case is found in the United Kingdom proceedings taken against the members of the International Tin Council under analogous legislation.

International Tin Council Litigation

In the tin litigation, various banks and tin brokers were owed considerable amounts (approximately \$1 billion) by the International Tin Council ("ITC"). The ITC incurred this debt due to arbitration awards for loans and contracts for the purchase and sale of tin. The banks and tin brokers sought to implead the ITC sovereign state members in the United Kingdom courts. To do this they had to observe the procedure prescribed by, and otherwise bring themselves within, the United Kingdom State Immunity Act. This legislation is similar to that in force in Canada.

The actions proceeded on the basis of a summons on the part of each

²⁶ State Immunities Act § 9(2).

²⁷ [1971] S.C.R. 997.

state defendant to discharge the order for service on them on the basis that the court had no jurisdiction over them. In other words, the member states pleaded their sovereign immunity under the State Immunity Act and claimed, as well, that they were not liable for the debts of the body which had been given corporate personality by United Kingdom law.

These issues became the nub of the several cases that together went to the Court of Appeal and subsequently to the House of Lords under the name *MacLaine Watson v. Department of Trade*.²⁸ The essential question in *MacLaine* involved the character of the International Tin Council and the relationship of its members to the Council. Therefore, although the issue of commercial activity lurked in the background, the points actually litigated concerned only threshold issues.

The general approach of the House of Lords to the case was described in the speech of Lord Templeman:²⁹

My Lords, if there existed a rule of international law which implied in a treaty or imposed on sovereign states which enter into a treaty an obligation (in default of a clear disclaimer in the treaty) to discharge the debts of an international organization established by that treaty, the rule of international law could only be enforced under international law. Treaty rights and obligations conferred or imposed by agreement or by international law cannot be enforced by the courts of the United Kingdom The courts of the United Kingdom have no power to enforce at the behest of any sovereign state or at the behest of any individual citizen or any sovereign state rights granted by treaty or obligations imposed in respect of a treaty by international law Public international law cannot alter the meaning and effect of United Kingdom legislation. If the suggested rule of public international law existed and imposed on a state any obligation towards the creditors of the ITC, then the 1972 order would be in breach of international law because the order failed to confer rights on creditors against member states. It is impossible to construe the 1972 order as imposing any liability on the member states. The courts of the United Kingdom only have power to enforce rights and obligations which are made enforceable by the order.

It is obvious from this approach that to attack a sovereign state through an alleged breach of an international agreement involves ensuring, in Canada at least, that there is some domestic law on which the claim can be founded. In the ordinary case, domestic law will have to mesh with or relate to the required commercial activity. In other words, a foundation must be laid for any exception to sovereign immunity which will, in its absence, come into play as the basic rule under the State Immunity Act.

Thus, the hurdles that have to be cleared in such circumstances are

²⁸ 3 All E.R. 523 (1989).

²⁹ *Id.* at 529-530.

significant. The whole issue of what constitutes commercial activity has seen much ink spilled. The lesson, of course, is that cross-border litigation against a foreign sovereign ought to be avoided if possible. If not, it is imperative to bring the action within one of the limited exceptions to sovereign immunity in the statute, principally commercial activity, and strictly follow its procedural requirements. The enormous complications for the plaintiffs in the tin proceedings bear witness to this.

Actions Involving International Organizations

While I am aware of only one international organization with its headquarters in Canada at the present time, the International Civil Aviation Organization (ICAO), and the chances of litigation are rather small, attention to trans-border litigation against international organizations is merited because of the proliferation of those organizations and the increasing resort to the courts for the solution to problems. The tin litigation flowing from the insolvency of the ITC is also a graphic illustration of this aspect.

Once again, there is legislation that may be relevant: the Privileges and Immunities (International Organization) Act, R.S.C. ch. P-23 (1985). One of the provisions of that legislation enables the Governor in Council to provide that an organization shall have the legal capacities of a body corporate - the very provision central to the United Kingdom proceedings involving the International Tin Council.

The House of Lords in *Maclaine Watson*,³⁰ made very clear the dichotomy in English law between executive recognition of or participation in international bodies by agreement, and the according of status at domestic law. The rule is that domestic courts generally, according to the law applied in the United Kingdom (which I submit would be followed in Canada), will not enforce obligations against or at the behest of an international organization solely on the basis of a treaty. Recognition in domestic law is required.

Litigation may, however, be brought by or against an international organization where it is accorded status as a legal person in the international instrument by which it is constituted and also by the law of a signatory. The rationale is grounded in comity. The courts will recognize legal persons created by the laws of a foreign state recognized by the Crown. This was decided by the House of Lords in the recent case of *Arab Monetary Fund v. Hashim* (Judgment February 21, 1991). Lord Templeman, in the leading speech in that case, concluded: "The status of an international organization incorporated by a foreign state is recognized by the courts of the United Kingdom. The status of an international organization incorporated by at least one foreign state should also be recognized by the courts of the United Kingdom." It had been argued in *Hashim*, on the basis of the *International Tin Council* decision, that no

³⁰ *Supra* note 27.

actions would lie because United Kingdom law did not recognize the Arab Monetary Fund.

The result is that if you ever have to sue or are sued by an international organization in Canada, the first thing to do is to determine its status at Canadian law, or at the law of one or more of its members. One should never assume such proceedings will be easy or quick, and an adequate appreciation of the fundamentals involved is essential.

V. CONCLUSION

Cross-border litigation covers a very broad spectrum. Perhaps the most fundamental rule of such litigation is not to assume that the procedural or substantive law in a foreign jurisdiction will necessarily parallel that with which one is familiar. Careful attention to the limitations that may exist is essential.

For circumstances in which resort to Canadian courts is required for the sole purpose of obtaining evidence, the most common situation, it must not be anticipated that the approach will be as liberal as that followed in United States courts. Proceedings akin to discovery merit a careful approach. It is that area where one must tread most carefully.

This was recognized by the United States Supreme Court when it considered the applicability of the Hague Evidence Convention in *Aerospatiale v. United States Dist. Court*,³¹

American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position. Judicial supervision of discovery should always seek to minimize its costs and inconvenience and to prevent improper use of discovery requests. When it is necessary to seek evidence abroad, however, the District Court must supervise pretrial proceedings particularly closely to prevent discovery abuses.³²

The implementation of the Hague Evidence Convention by Canada through federal and provincial action, while it would advance the matter, will not change the basic parameters. In this regard I might profitably close with some remarks made by Robert B. von Mehren in 1984:

In conclusion, one senses from time to time in decisions both by our courts and foreign courts that there is presently a pervasive judicial chauvinism which says: "Only our way is right. Our interests, as we perceive them, are superior to any other national interests." In response, Learned Hand, for whom I clerked years ago, liked to quote Oliver Cromwell, "I beseech you, in the bowels of Christ, think it possible you may be mistaken." I suggest that the American judiciary should adopt a Cromwellian hesitation in attempting to apply expansively American style discovery abroad. Similarly, foreign courts

³¹ 107 S.Ct. 2542 (1987).

³² *Id.* at 2557.

should not checkmate thoughtful and deliberate applications of the Hague Convention to resolve international discovery disputes by automatically saying that the discovery is sought for pre-trial purposes and, thereby, preventing the effective use of the Convention. With give and take on both great sides of the oceans we can achieve a fair and rational accommodation of international interests.³³

³³ 16 Int'l Law & Pol. 985 at 996-7 (1984).